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**IN THE**  
**Supreme Court of the United States**

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**NO. 157 OCTOBER TERM, 1958**

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**LEWIS M. STEVENS, Successor to Joseph Lawler as  
Secretary of Highways of the Commonwealth of Penn-  
sylvania and GEORGE M. LEADER, Governor of the  
Commonwealth of Pennsylvania, Appellants**

**v.**

**J. K. CREASY, WILLIAM W. McNAMEE, FRANK  
RANALLO, A. W. TUICCILLO, ED KLEEMAN and  
R. G. CUMMISKEY, on Behalf of Themselves and Other  
Property Owners and Leasees Similiarly Situated,  
Appellees**

**and**

**JACK C. MARSHELL and ALICE E. MARSHELL,  
Appellees**

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**On Appeal From the United States District Court for the  
Western District of Pennsylvania.**

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**MOTION TO AFFIRM**

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v.

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and

JACK C. MARSHELL and ALICE E. MARSHELL, Appellees

On Appeal From the United States District Court for the Western District of Pennsylvania.

## MOTION TO AFFIRM

I.

### MOTION

AND NOW, Appellees, plaintiffs below, by their counsel, A. E. KOUNTZ and EDWARD P. GOOD, respectfully move this Honorable Court to affirm the judgment of the Court below on the ground that it is manifest that the questions on which the decision of the cause depend are so unsubstantial as not to need further argument.

*Statement.***II.****STATEMENT**

In August, 1955, informal announcements were made by the Department of Highways of the Commonwealth of Pennsylvania of the intention of the Secretary of Highways of the Commonwealth to assume control of a five-mile section of highway, commonly known as the Airport Parkway, in Allegheny County, Pennsylvania, originally constructed and then and at the present time owned and maintained by Allegheny County, for the purpose of converting that section of the highway to a limited access or non-access highway.

The section of the road in question was built in 1949; the right-of-way therefor was obtained by purchase or by condemnation from the owners of the land. Many of the said owners retained abutting land and are among appellees herein. Other appellees have purchased abutting properties since the construction of the highway and still others are tenants on properties abutting the highway.<sup>1</sup>

If plaintiffs are barred from access to the highway, the effect would be the eviction of some plaintiffs from their homes. For others, it would mean complete loss of large investments of money, effort and time; for example, some plaintiffs own and operate gasoline stations; others, a restaurant and an amusement park. None of these establishments could be reached by automobile if access to and from the highway is barred.<sup>2</sup>

1. Opinion of the Court below: Jurisdictional Statement, Appendix "A", page 24.
2. Opinion of the Court below: Jurisdictional statement, Appendix "A", pages 22-24.



## Statement.

This threatened conversion of the highway would have been pursuant to the provisions of an Act of Assembly of the Commonwealth of Pennsylvania of 1945 (May 29 P. L. 1108, Sec. 1, et seq., as amended, 36 (Pa.) Purdons Statutes Sec. 2391.1 ff.)

It appeared to plaintiffs at the time of the announcements aforesaid that under the terms of that statute, considered together with other statutes and the decisional law of Pennsylvania, their loss of access was not to be compensated for; accordingly, they entered the District Court for the Western District of Pennsylvania, under the authority of 28 U.S.C.A. Sec. 2281 and Sec. 2284, for an injunction. The Three-Judge District Court initially stayed proceedings and directed plaintiffs to seek a construction of the statute and to test their rights before the Courts of Pennsylvania. Accordingly, plaintiffs brought a substantially identical complaint and prayer for injunction against defendants in the Court of Common Pleas of Dauphin County. That Court held that plaintiffs were not entitled to equitable relief and said that they should wait until after condemnation before seeking damages. That Court did not decide whether or not plaintiffs would be entitled to such damages.<sup>3</sup>

The Supreme Court of Pennsylvania affirmed without opinion<sup>4</sup>; thus the State Courts refrained from construing the statute but have expressed the view that appellees must wait until their right of access is destroyed and thereafter enter the Courts to discover at

3. The opinion of the Dauphin Court of Common Pleas is printed in the Jurisdictional Statement filed by Appellants, Appendix "C", page 52.
4. Jurisdictional Statement, Appendix "D", page 57.

*Counter-Statement of Questions Presented.*

that time whether or not they have suffered compensable damages or *damnum absque injuria*.

Following the summary disposition of their case in the State Courts, appellees returned to the Three-Judge Court for relief and after further argument and testimony—jurisdiction having been conceded—that Court granted a permanent injunction on the ground that the statute authorizes the destruction of appellees' rights of access without providing compensation for such destruction and thus purports to deprive them of their property without due process of law<sup>5</sup>.

III.

COUNTER-STATEMENT OF QUESTIONS  
PRESENTED

Appellees respectfully suggest that in the Jurisdictional Statement appellants have presented the questions on appeal in a somewhat inaccurate manner; in particular, questions 1 and 2 do not fairly present the situation. This Court should note that there was never any question in the minds of appellees or anyone else concerning the right of appellees or any other person to seek compensation from the Board of Viewers, as established by the general law of the Commonwealth of Pennsylvania, in any situation, whether covered by a particular statute or not, in which that person believes that he has suffered a loss because of a taking or condemnation by the Commonwealth or by any agency with the power of eminent domain. The obtaining of such compensation, however, is an entirely different matter. The question raised by appellees was rather whether or not the loss of access without the taking of land would

5. Jurisdictional Statement, Appendix "A", p. 26; p. 34 et seq.

### *Counter-Statement of Questions Presented.*

be compensable. That question the State Courts did not answer. Appellees vigorously deny, therefore, that the state courts have upheld the constitutionality of the statute.

Appellees believe that the questions would be more accurately stated as follows:

1. After the State Courts have declined to rule on the constitutionality of a state condemnation statute, may a Three-Judge Court enjoin the enforcement of the statute on grounds that it is unconstitutional and that if plaintiffs are required to seek relief in the State Courts after condemnation, they will suffer an irreparable loss?

2. After state courts have refused to construe a state statute, may a Three-Judge Court proceed to construe the statute according to the law of the state, determine that it is unconstitutional and enjoin its enforcement?

Appellees respectfully propose to this Court, in addition to the grounds expressed in the opinion of the District Court, other reasons<sup>6</sup> for affirming the opinion below, even though, strictly speaking, they may not be labeled "questions presented on appeal". The statute in question is clearly in breach of the protection by the Fourteenth Amendment against unlawful and arbitrary discrimination and the guaranty of equal protection of the laws. Furthermore, the record indicates that appellants are estopped from attempting to deprive appellees of their access to the highway.

6. Opinion of the Court Below, Jurisdictional Statement, Appendix "A", page 43. The Court below mentioned the grounds, but stated that it need not consider them in view of its conclusion that the injunction should issue on the ground set forth, in detail, in its opinion.



## Argument.

### IV.

## ARGUMENT

### Introduction

Although the instant appeal involves a large amount of money, it is not a case of national significance. The decision upon the grounds stated by the Court below is in accord with practically all recent authority in the United States.

#### *A. The Decision Below is Clearly Correct*

Although the particular problem involved in this appeal, the conversion of an existing general-access highway into a non-access freeway, is a novel one in the Commonwealth of Pennsylvania, it is not so on the national scene. The recent authorities on this problem are surveyed in the opinion of the Court below<sup>7</sup>. In one of the articles mentioned in the opinion, "Freeways and Rights of Abutting Owners", 3 *Stanford Law Review*, page 298, February, 1951, the following statement appears with reference to the problem of conversion of an existing highway into a freeway (at Page 302):

"Without more, the damage to the [abutting] property owner is so severe that the Courts have universally held that he is entitled to compensation. The public can only justify its act of completely shutting off land under the power of eminent domain."

Historically, although there are cases to the contrary, the general and universally accepted modern rule

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7. Jurisdictional Statement, Appendix "A", page 32.

### Argument.

is that access, being an incorporeal hereditament or an easement, is a property right and as such may not be condemned without compensation. *Donovan v. Pennsylvania Co.*, 199 U.S. 279, 301-302; 26 S. Ct. 91; 50 L. Ed. 192 (1905); *U. S. v. Welch*, 217 U.S. 333, 30 S. Ct. 527, 54 L. Ed. 787 (1910).

To the knowledge of appellees, no jurisdiction of the United States has attempted to bar access of abutting owners to existing highways without compensating them therefor. The Court below construed the statute as providing for just such a deprivation and has therefore enjoined its enforcement. There can be little question as to the correctness of the construction by the Court below of the statute. Appellants have conceded as much.<sup>8</sup> A reference to the Pennsylvania decisions involving the destruction of access without the taking of land by the Commonwealth of Pennsylvania as distinguished from municipalities will reveal that in every instance the Courts of Pennsylvania have held that such destruction is not compensable. This line of decision established a dichotomy which presents a paradox in the law of the State of Pennsylvania. It is clear that when a municipality condemns access, the condemnation is always compensable. *Breinig v. Allegheny County*, 332 Pa. 474, 2 A. 2nd 842 (1938); *Walsh v. Scranton*, 23 Pa. Superior Ct. 276 (1903); *Kane v. Aspinwall Delafield Company*, 289 Pa. 535, 137 Atl. 10 (1910); *Stewart v. Gimbel Brothers*, 285 Pa. 102, 131 Atl. 728 (1926). In these cases, the Courts of Pennsylvania have said that access is a property right which can no more be taken without compensation than can the property itself.

8. Jurisdictional Statement, page 14; Appendix "A", p. 43.

### Argument.

Nevertheless, when the same question has arisen under a condemnation by the Commonwealth itself, the Pennsylvania Courts have held that access is merely a consequential injury and as such is not compensable; *Soldiers & Sailors Memorial Bridge Case*, 308 Pa. 487, 162 Atl. 309 (1932); *Ewalt v. Pennsylvania Turnpike Commission*, 382 Pa. 529, 115 A. 2nd 729 (1955); *Koontz v. Commonwealth*, 364 Pa. 145, 70 A. 2nd 308 (1950). Appellees respectfully submit that *the character of a property right cannot vary according to the identity of the condemnor.*

Although the Court below based its decision upon the ground that the statute does not provide for compensation for the deprivation of a property right, nevertheless, appellees urge that this Court consider other vices of the statute.<sup>9</sup> This Court's attention in particular is respectfully called to section 8 of the statute:<sup>10</sup>

"The Secretary of Highways shall have authority to enter into agreements for the sharing of the costs of property damages with the officials of any political subdivision of the Commonwealth which assumes such responsibility by proper resolution or ordinance."

As the lower Court said,<sup>11</sup> although the statute does not provide generally for compensation for the loss of access, it does direct that some favored abutters may be so compensated. Apparently the requirement would be

9. Jurisdictional Statement, Appendix "A", page 43.

10. Appearing on Page 48, Jurisdictional Statement, Appendix "B".

11. See footnote to opinion, page 43, Appendix "A" aforesaid.

that such abutters exercise sufficient political influence in the municipality in which their land lies. Their neighbors in adjoining municipalities without such influence may receive nothing for their loss of access. Such discrimination, from a constitutional standpoint, is indefensible and if for no other reason, the statute should be struck down under the aegis of the equal protection of the law; see *Colgate v. Harvey*, 296 U. S. 404, 50 S. Ct. 252, 80 L. Ed. 299 (1935); *Morey v. Doud*, 354 U. S. 457, 77 S. Ct. 1344, 1 L. Ed. 2nd. 1485, (1957).

This Court is also respectfully asked to compare the statute under consideration with the "Turnpike Act", the Act of Assembly of the Commonwealth of Pennsylvania of May 21, 1937, appearing in 36 Purdon's Pa. Statutes, Sec. 652, et seq. By that Statute the Turnpike Commission is authorized to acquire by condemnation, "lands, rights, easements, franchises, and other property . . .". There is no difference in law or in reason between the rights of property owners abutting the Pennsylvania Turnpike for whom the legislature provided compensation for the loss of access and the rights of the appellees in this case, abutting another four-lane highway identical in all practical respects to the Pennsylvania Turnpike.

Appellees should further like to call to the attention of the Court a question raised in the lower Court and briefly touched upon in the opinion filed in this case:<sup>12</sup>

"[At the time of original condemnation of the land for the construction of the Airport Parkway by Allegheny County] the Board of Viewers, when assessing damages to the property owners for their

<sup>12</sup> Jurisdictional Statement, Appendix "A", page 25.

## Argument.

land so taken, diminished the damages to the extent that the abutting properties were enhanced in value because of the benefits obtained by reason of the frontage on the new Parkway and the access thereto."

In Pennsylvania, a County is a political subdivision of the Commonwealth of Pennsylvania, and County officers act for and on behalf of the Commonwealth in their official capacities. *Commonwealth v. Walker*, 305 Pa. 31, 157 Atl. 340 (1931); *Pennsylvania Turnpike Commission Land Condemnation Case*, 347 Pa. 643, 32 A. 2d 910 (1943). Appellants now seek to destroy the benefits which, it was earlier claimed, would accrue to appellees and in effect, seek to expand the original condemnation without payment of further compensation. The principles of equitable estoppel are clearly applicable here over and above every other legal consideration in this case.

### B. *The Court below was Justified in Proceeding to a Final Determination.*

Appellants have cited *Alabama Public Service Commission v. Southern Railroad Co.*, 341 U.S. 341, 71 S. Ct. 762, 95 L. Ed. 1002 (1951). However, this Court, in the very beginning of the opinion in that case, distinguished it from a situation such as the instant one in which the constitutionality of a state statute is before the Court. Very recently this Court has reaffirmed the right and duty of a District Court, where a state statute has not been construed by the courts of that state, to construe the act on principle or the weight of authority. *Doud v. Hodge*, 350 U.S. 485, 76 S. Ct. 491, 100 L. Ed. 577.



### Argument.

(1956). It must be remembered, too, in the instant case, that the District Court, as we have previously mentioned, fulfilled every obligation of comity and policy in that it construed the act only after referring the case to the State Courts and after refusal by the "Commonwealth Court" in Dauphin County and by the Supreme Court of Pennsylvania to answer the question upon which the entire case turns.

Even if the Courts of Pennsylvania had squarely met the question of constitutionality, however, and had decided that appellees had no constitutional right to compensation for the loss of access to the Parkway, the District Court could still have reached the decision that it did. *Morey v. Doud*, supra; *Webb v. Southern Railway Co.*, 248 Fed. 618 (1918) cert. den. 247 U.S. 518, 38 S. Ct. 582, 62 L. Ed. 1245.

#### C. *The Decision of the District Court was Timely*

There certainly was nothing startling or novel in the decision of the District Court to enjoin the enforcement of a statute construed by it to be unconstitutional on the ground that, although appellees, following condemnation, could enter the State Courts and then seek review by this Court, the hardship involved rendered the case one peculiarly within the jurisdiction of equity. *Toomer v. Witsel*, 334 U. S. 385, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948). The right of a land owner to enjoin enforcement of a statute is especially clear in a case involving eminent domain, as is demonstrated by the authority cited by the Court below in 29 Corpus Juris Secundum, Eminent Domain, §§ 97, 98 and 99<sup>13</sup>. In the case

13. Opinion of the District Court, Jurisdictional Statement, Appendix "A", page 36.

at bar, condemnation would evict many appellees from their homes or in the alternative expose them to the hazards of remaining in residences from which access to the highway for ambulances and fire trucks, as well as ordinary vehicles, would be prohibited. *Smith v. Shiebeck*, 180 Md. 412, 24 A. 2nd 795, (1942) As a general proposition of equity, a property owner should be entitled to an injunction when a serious question of constitutionality arises concerning a condemnation statute, pending resolution of that question: *Jahr, Law of Eminent Domain*, page 435; 2 *Lewis on Eminent Domain*, 2nd Ed., page 1351 and cases cited therein; *Del Monte Livestock Co. v. Ryan*, 133 Pac. 1048 (Colorado) (1913). In this situation, the District Court could have done nothing else but enjoin appellants.

Appellants in the instant case take the position that they should be allowed to condemn access before the question of compensation is adjudicated. They have argued that at that time, the Courts then should find that appellees are not entitled to damages, but they have suggested that "of course, a misinterpretation . . . of the Fourteenth Amendment's requirement of compensation would be subject to Federal review."<sup>14</sup> In other words, appellants propose that the Three-Judge Court should refuse the injunction and that appellees' rights are sufficiently protected because, after condemnation, on a petition for certiorari to this court, the statute may eventually be decreed unconstitutional by this Court after plaintiffs have been evicted from their homes and their businesses have been destroyed.

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14. Jurisdictional Statement, page 10.

#### D. No Severance is Possible

Counsel for appellants, at page 13 of their Jurisdictional Statement, apparently being willing to concede that the statute is probably unconstitutional, at least in part, insist that the Three-Judge Court below should have severed the unconstitutional sections of the statute from the other sections and sustained the other sections. It is interesting to note, however, that they do not attempt to indicate at what point or points in the statute the surgical knife should be applied. It is clear that no one else would know that because the offending section 8 is obviously an entity. Furthermore, no dissection could cure the trouble here because the statute then would need new provisions which would assure compensation to appellees and those in similar situations in accordance with the principles set forth in the constitutional decisions, and the text book authorities, referred to by the Court below in its opinion (Appendix "A", attached to Jurisdictional Statement, page 36 et seq.). The provision for compensation in seizure cases must be "certain and reasonably prompt." 29 C.J.S. Eminent Domain, Sec. 99.

From C.J.S., Vol. 82, Sec. 93, subject "Statutes," we quote:

"Sustaining the constitutional part while the unconstitutional part falls has been held possible only where it is not necessary to insert words or terms to separate the constitutional part and give effect to it alone . . ."

*Conclusion.***CONCLUSION**

Appellees respectfully submit, for the foregoing reasons, that appellants present no substantial question for the decision of this Court and that the judgment and decree of the District Court should be affirmed.

A. E. KOUNTZ

EDWARD P. GOOD,

(Attorneys for Appellees)

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